

[*Jarvis v. Battelle Pacific NW Laboratory*, 97-ERA-15 \(ARB Aug. 27, 1998\)](#)
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U.S. Department of Labor
Administrative Review Board
200 Constitution Ave, NW
Washington, DC 20210

ARB CASE NO. 97-112
ALJ CASE NO. 97-ERA-15
DATE: August 27, 1998

In the Matter of:

TIMOTHY T. JARVIS,
COMPLAINANT,

v.

BATTELLE PACIFIC NORTHWEST
LABORATORY,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C. §7622 (1994), the Solid Waste Disposal Act (SWDA) (also known as the Resource Conservation and Recovery Act (RCRA)), 42 U.S.C. §6971 (1994), the Toxic Substances Control Act (TSCA), 15 U.S.C. §2622 (1994), the Water Pollution Control Act (WPCA), 42 U.S.C. §300j (1994), the Comprehensive Environmental Recovery Act (CERCLA), 42 U.S.C. §9610 (1994) (collectively, the environmental acts), and the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. §5851 (1994). Before this Board

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for review is the Recommended Decision and Order Dismissing Complaint (R. D. and O.) of the Administrative Law Judge (ALJ) issued on June 2, 1997. The ALJ concluded that Complainant, Timothy T. Jarvis (Jarvis), had failed to establish that Respondent, Battelle Pacific Northwest Laboratory (Battelle), had violated the ERA and/or the

environmental acts by taking adverse action against him in retaliation for engaging in activity protected under those statutes. Specifically, the ALJ concluded that Jarvis failed to establish that the protected activity he had engaged in played a role in the decision to suspend him from his employment without pay for a period of one week. R. D. and O at 7. The ALJ further found that the suspension would have been imposed regardless of Jarvis' protected activity. *Id.*

The ALJ therefore recommended that the complaint be dismissed. Based on a review of the record and the arguments of the parties, we conclude that the ALJ's ultimate conclusion is proper, and we dismiss the complaint. We provide the following analysis to correct the ALJ's findings regarding whether Jarvis' work developing Risk Acceptance Criteria for use by the Department of Energy in the Tank Waste Remediation System constituted protected activity. We also supplement the ALJ's retaliatory intent analysis.

FACTUAL BACKGROUND

We agree with the essential facts as found by the ALJ, R. D. and O. at 2-7. We provide the following factual summary as background for our discussion of the protected activity and retaliatory intent issues. Battelle operates the Pacific Northwest Laboratory under contract with the Department of Energy (DOE). HT at 357-58 (Shipp).¹ The Battelle laboratory is one of a system of national laboratories to which the DOE assigns work, according to the agency's needs. HT at 359, 376 (Shipp).

Jarvis' history of protected activities at Battelle

Jarvis is a Registered Environmental Assessor, licensed by the State of California, and holds a Ph.D. in Environmental Toxicology and a master's degree in Agronomy/Soil Science. CX 15; HT at 31. Jarvis and his wife Mary Jarvis, who holds similar qualifications in the field of environmental compliance, began work at Battelle in April 1991. CX 15; HT at 29. Jarvis initially worked in the laboratory safety department at Battelle, where he performed environmental compliance audits of many of the approximately 120 different facilities that actually comprise the Battelle laboratory. HT at 29, 32-40 (Jarvis). During his first year at Battelle, Jarvis' supervisors, Glenn Hoenes and Harold Tilden, were critical of Jarvis' interaction with other Battelle staff members while Jarvis conducted his auditing activities. HT at 41-42, 50-63 (Jarvis); CX 7, 11, 13; *see* CX 12. Jarvis testified that there was a correlation between his inspection results and the complaints to his supervisor that suggested that the individuals who were complaining were displeased with Jarvis' findings. HT at 40-41. Jarvis also testified that he was told by a higher level manager that he should "get along and cajole the research people and facilities people into compliance, . . . but not bring up serious problems" HT at 52.

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In a February 16, 1992 memorandum to Tilden, Jarvis protested the non-specific nature of the criticisms and questioned whether the complaints were actually attempts to coerce

Jarvis to perform his audits less conscientiously. CX 12; HT at 61-62 (Jarvis). Jarvis also outlined his efforts to obtain feedback directly from Battelle personnel whose facilities he had audited and to improve his communication skills, including enrolling in management and leadership training courses. CX 12. In addition, Jarvis renewed his previous requests to be relieved of the responsibility to perform compliance audits as a primary work assignment, stating that he had understood when he was hired that he was to be primarily responsible for research and for work on permits. *Id.* He also stated that he did not feel that he was "particularly qualified or politically astute enough to perform this function for the [Environmental Compliance] section." *Id.*

In April 1992, Jarvis and his wife met with Battelle Director William R. Wiley to voice their concerns that some Battelle facilities were being operated in violation of environmental statutes and regulations, and that the auditing process was being undermined by supervisory coercion. CX 15; HT at 63-66 (Jarvis). In response to the Jarvises' concerns, Wiley appointed a team of retired Battelle managers to investigate. CX 10; HT at 66-68 (Jarvis), 368-70 (Shipp). On May 18, 1992, Jarvis wrote Wiley a letter advising that his meetings with the investigative team led him to believe that the team was avoiding the compliance issues raised by Jarvis, and instead was focusing on Jarvis as the source of the problem. In the letter Jarvis also suggested that the team needed to shift its focus from Jarvis' personality and work as an inspector, and to engage "outside legal counsel for advice on environmental compliance and environmental law" in order to rectify the compliance problems that Jarvis had raised. CX 19; HT at 68-70.

In July 1992, the team submitted a lengthy report to Wiley, summarizing its findings regarding the environmental compliance issues that had been raised by Jarvis and the question whether Jarvis had been the subject of coercion regarding his auditing work for Battelle. CX 10. The team agreed with Jarvis that action needed to be taken on some compliance issues but disagreed with Jarvis regarding others. *Id.* The team found that there had been no auditor coercion and concluded that the criticisms of Jarvis' demeanor as an auditor -- *e.g.*, that he was abrasive, intimidating, officious -- were justified. *Id.* The team's investigation also indicated, however, that some of the criticisms were related to questions concerning applicable environmental regulations, and that Battelle had failed initially to provide Jarvis with adequate orientation and training in Battelle auditing procedures. *Id.*

Among the compliance issues addressed by the team was Jarvis' concern that the long term storage of lithium by Westinghouse Hanford Company at the 324 Building, which was operated by Battelle as part of the laboratory, was in violation of RCRA. CX 10 at B80; *see* RX 15; HT at 386-91 (Shipp). Jarvis had also expressed concern that the storage of lithium in a building that housed radioactive material posed an explosion risk with the potential for widespread radioactive contamination. CX 10 at B79; RX 15; *see* HT at 33-37 (Jarvis), 362-68, 382-91 (Shipp).²

In its July 1992 report on the lithium storage issue, the investigative team concluded that the lithium at the 324 Building was in solid form rather than the more unstable liquid form, was actually stored in a shed adjacent to the 324 Building, and that Westinghouse Hanford Company had evaluated "credible accidents regarding lithium . . . and determined the [storage] plan was an acceptable risk." CX 10 at B79. The team also found that disposal of the lithium by Westinghouse Hanford Company was then in progress. *Id.* On August 27, 1992, after the bulk of the lithium had been removed, two minor explosions occurred causing a release of lithium. More than 150 employees working in the 324 Building were evacuated. The explosions occurred in connection with a cleansing process to remove traces of the lithium from the storage area. CX 8; *see* HT at 38-40 (Jarvis), 385 (Shipp).

In October 1992, Wiley and two other managers, Tom Chikalla and John Hirsch, met with Jarvis to discuss the team's findings. CX 14; *see* HT at 70-75 (Jarvis). Battelle records of that meeting reflect that Wiley stated that it was unfortunate that it had been necessary for Jarvis to bring his concerns to Wiley, but thanked Jarvis for having done so. Wiley also advised Jarvis that the results of the investigation included the hiring of a new attorney to advise Battelle on environmental matters. With regard to the criticisms of Jarvis that arose from his auditing work, Wiley advised Jarvis that his 1991 Staff Development Review (SDR) would be revised to reflect that "there has been a joint communications problem." Wiley stated that Battelle needed to provide more training and that "overworked" Environmental Compliance staff had also contributed to this problem. In regard to Jarvis' role in the communications problems, Wiley provided him with materials concerning an off-site course on how to accomplish objectives within an organization. Finally, Wiley assured Jarvis that he would not be retaliated against for raising his concerns to Wiley, and that Wiley, Chikalla, and Hirsch would be available to intervene should Jarvis feel that he was being retaliated against in the future. CX 14 at B56-58; *see* HT at 71 (Jarvis).³

At Wiley's direction, Jarvis' request for a transfer out of Battelle's environmental compliance audits section was granted in May 1992, and Jarvis was reassigned to the Environmental Management Operations (EMO) division. HT at 30, 76 (Jarvis); *see* CX 3. The SDR prepared by Jarvis' EMO supervisor in December 1992 states that Jarvis had "some difficulty" in establishing "effective work relationships." CX 3. Jarvis testified that he had asked the supervisor who drafted the SDR to explain the basis for the foregoing statement and that the supervisor had told Jarvis that "this is the word in the hall." HT at 77-78.

In 1994, in connection with a reorganization, Jarvis was assigned to Battelle's Environmental Policy and Planning Technical Group. HT at 93 (Jarvis); *see* HT at 257-58 (Gajewski). In an SDR dated April 8, 1995, Jarvis' immediate supervisor, Steve Gajewski, expressed his concern that Jarvis was "carrying strong feelings about past events" that caused him "to react a little vigorously about certain things," although Jarvis generally interacted "congenially and effectively" with his colleagues. CX 4. Gajewski testified that the "past events" he was referring to were linked, in part, to Jarvis' whistleblowing activities in 1992. HT at 280-83.

In 1995, Jarvis was given responsibility for developing a new Risk Acceptance Criteria (RAC) for application to the DOE Tank Waste Remediation System.⁴ HT at 200-15 (Heaberlin). The task of developing criteria to replace the methodology then in use by DOE had been undertaken unsuccessfully by Westinghouse Hanford, and then was redirected to Battelle. HT at 200-02 (Heaberlin). Heaberlin, Jarvis' second-level supervisor, testified that Jarvis was chosen to work on the project because of his expertise in risk assessment and because management at DOE's Richland facility thought that Jarvis "would be the right guy to take a fresh approach" to the development of the RAC. HT at 204; *see* HT at 200.

In the Fall of 1995, Jarvis engaged in a teleconference call with members of the Defense Nuclear Facility Safety Board (DNFSB) staff to discuss the criteria he had developed. CX 2; HT at 88 (Jarvis). Mary Jarvis, who previously had left her job at Battelle to take a position at DOE's Richland facility, also participated in the teleconference discussion. HT at 88 (Jarvis), 306-07 (Irby). Jarvis was surprised that DOE headquarters officials in Washington, D.C. were included in the teleconference by the DNFSB. The discussion "quickly went from being a technical discussion to being a political discussion." HT at 88 (Jarvis). After that call, Charlie O'Dell, an employee at DOE headquarters, telephoned Battelle Associate Laboratory Director Shipp to complain about the criteria that had been developed by Jarvis. O'Dell also questioned whether Mary Jarvis' participation in the teleconference in support of the work product of her husband posed a conflict of interest. HT at 359-62, 391 (Shipp).

O'Dell's complaint prompted Shipp to ask Heaberlin about Jarvis and the nature of his work on the RAC. HT at 391-92 (Shipp). As indicated above, Shipp testified that he did not recall Jarvis' participation in the 1992 lithium storage issue, and that, to his recollection, the telephone call from O'Dell was the first time that he had any familiarity with Jarvis or his work at Battelle. HT at 360-63, 391. Both documentary evidence and the testimony of Battelle's supervisors indicate that O'Dell's primary concern was related to the content of the RAC that Jarvis had developed, and the "firestorm" of controversy and resistance that such "a radical alternative" to the methodology then in use could be expected to generate. CX 2; HT at 200-15, 219-22 (Heaberlin), 161-70, 293-94 (Gajewski), 302-09 (Irby).

Shipp was not familiar with the technical aspects of the RAC, and he considered Jarvis accountable for DOE's negative reaction to the new methodology. HT at 391-93 (Shipp). In contrast, Gajewski was familiar with the technical issues involved in developing the RAC, and was able to distinguish between the content of Jarvis' work and its presentation to DOE. In the SDR prepared by Gajewski in January 1996, Gajewski praised the quality of Jarvis' technical work on the RAC. CX 2. Gajewski also noted that the ultimate responsibility for "paving the way for the alternative approach to risk" presented by the RAC lay with the DOE Richland

facility. *Id.* He acknowledged that he had failed to fully comprehend the nature of Jarvis' assignment and to refer Jarvis to the proper staff members who could have assisted in the "roll-out strategy" for such a sensitive project. *Id.* Gajewski also stated that he had "the sense, but not the certainty" that Jarvis may have "underutilized" his diplomatic skills in his presentation of the RAC to DOE. CX 2; *see* HT at 260-70, 287- 94 (Gajewski). Gajewski also praised Jarvis' work on the "son-of-RAC" project that ultimately produced a modified methodology that was acceptable to DOE. CX 2; *see* HT at 260-61, 267-68 (Gajewski) .

The Peschong incident of April 19-22, 1996

Although the record evidence contains minor conflicts regarding the events of April 19-22, 1996, the central facts are uncontradicted. On the afternoon of Friday, April 19, 1996, Jon Peschong, a DOE supervisor at the Richland facility, met with Mary Jarvis to discuss her work performance. HT at 95-96, 108-09 (Jarvis), 318-19 (Peschong); CX 6, 16, 20; RX 13. After the meeting, Mary Jarvis telephoned Jarvis and told him that she was emotionally upset and had developed a migraine headache. HT at 96, 108-09 (Jarvis). That evening, Jarvis telephoned James McClusky, another supervisor in Mary Jarvis' chain of command at DOE, and expressed his concern about Peschong's meeting with her. HT at 96-98, 109-110 (Jarvis); CX 21 (McClusky dep.) at 8-15, 18. On Sunday morning, April 21, Jarvis telephoned Peschong at his home, admonished him for having upset his wife and stated that Peschong had acted like a "jerk." HT at 97-98, 110-13 (Jarvis), 312-15 (Peschong); CX 18; RX 13. Jarvis also told Peschong that he should not resume the discussion with Mary Jarvis on Monday morning. HT at 98 (Jarvis), 312 (Peschong); CX 18; RX 13. Jarvis informed Peschong that Jarvis had business in the Richland facility building where Peschong and Mary Jarvis had adjacent offices Monday, April 22, thus suggesting that he would be nearby if Peschong were to resume his discussion with Mary Jarvis. HT at 98, 113-16 (Jarvis), 312, 325-26, 335-36 (Peschong); CX 18; RX 13.

Peschong testified that Jarvis did not threaten him with physical harm or use any language stronger than "jerk," but that Jarvis sounded "angry and hostile" in the telephone conversation on April 21, and that the conversation left Peschong feeling threatened. HT at 311-14, 320-21, 325-31, 333-36; *see* RX 13; CX 21 (McClusky dep.) at 16-18; R. D. and O. at 4-5. After the telephone conversation with Jarvis, Peschong telephoned the security chief for the DOE Richland facility and advised him that he was concerned for his personal security. HT at 313 (Peschong); RX 13. The security chief advised Peschong that he should avoid the Jarvises on Monday, April 22, and should advise DOE security if Jarvis approached him on that day. HT at 313-14, 326-28 (Peschong); RX 13. Peschong also telephoned McClusky on April 21 to express his concern about his personal security. HT at 313 (Peschong); CX 21 (McClusky dep.) at 16-17.

On Monday, April 22, Jarvis arrived before 8:00 a.m. at the DOE Richland facility building where his wife and Peschong occupied adjacent offices. McClusky saw Jarvis in Mary Jarvis' office that morning and became concerned about the possibility of an altercation between Peschong and Jarvis. McClusky then contacted Associate Laboratory Director Shipp and asked about Jarvis' business at the Richland facility that morning. McClusky requested that Shipp contact Jarvis and request that he return to the Battelle facility. CX 21 (McClusky dep.) at 19-21.

Peschong had also sighted Jarvis in Mary Jarvis' office that morning, and had avoided contact with Jarvis by removing himself to a supervisor's office in another part of the building. HT at 315-16, 321, 324-26, 328-29, 333-34 (Peschong). At that time, Peschong telephoned the DOE personnel office and the security chief and advised them of Jarvis' presence in Mary Jarvis' office. HT at 316, 319-20 (Peschong); RX 13. In the meantime, after Shipp contacted Gajewski and Heaberlin about the situation at the Richland DOE facility involving Peschong and Jarvis, they paged Jarvis and asked him to return to the Battelle facility. HT at 222-24 (Heaberlin); CX 6.

After Jarvis returned to the Battelle facility on the afternoon of April 22, Gajewski, Heaberlin, and a human resources specialist met with Jarvis to hear his view of the events involving Peschong. HT at 223-24 (Heaberlin); CX 6. Following discussions among Jarvis' supervisors and deliberations by a Personnel Action Review Committee that was convened to determine how to respond to the Peschong incident, Jarvis was advised by letter on April 26, 1996, that he would be suspended for one week without pay, beginning on April 29, 1996. HT at 165-66 (Merryman); CX 5, 16. ⁵ The letter provided a detailed explanation of the reasons for the suspension, stating that it was important to consider Jarvis' actions in the "historical context" of Jarvis' "communications style." CX 5. The letter emphasized that "any further inappropriate actions could lead to further disciplinary action up to and including termination." *Id.*

DISCUSSION

Applicable standards

To prevail in this complaint under the ERA and/or the environmental acts, Jarvis must prove by a preponderance of the evidence that Battelle's decision to suspend him was based, at least in part, on Jarvis' engaging in activities that are protected under one or more of those statutes. *See Dysert v. Sec'y of Labor*, 105 F.3d 607 (11th Cir. 1997); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386 (8th Cir. 1995); *Pogue v. United States Dep't of Labor*, 940 F.2d 1287 (9th Cir. 1991); *Odom v. Anchor Lithkemko/International Paper*, ARB Case No. 96-189, ALJ Case No. 96-WPC-0001, Oct. 10, 1997, slip op. at 3. In this circumstantial evidence case, Jarvis may establish a violation of the employee protection provision by proving that he engaged in protected activity, that Battelle managers were aware of the protected activity when they decided to impose the one-week

suspension, and that the protected activity provided a basis for that decision. *See Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1572-73 (11th Cir. 1997); *Dysert*, 105 F.3d at 608-10; *Simon*, 49 F.3d at 389. If Jarvis

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establishes, by a preponderance of the evidence, that the suspension decision was based in part on his protected activity, Battelle may nonetheless escape liability under the dual, or mixed, motive doctrine by proving that it would have taken the adverse action in the absence of Jarvis' protected activity. *Combs v. Lambda Link*, ARB No. 96-066, ALJ Case No. 95-CAA-18, Oct. 17, 1997, slip op. at 4 and cases cited therein. The standard burden of proof in employment discrimination cases, a preponderance of the evidence, applies to the employer's burden under the environmental acts. *See Odom*, slip op. at 3, 13. The ERA, as amended in 1992,⁶ however, specifically imposes a higher burden of proof -- the clear and convincing evidence standard -- on an employer under the dual motive doctrine. 42 U.S.C. §5851(b)(3)(D) (1994); 29 C.F.R. §24.7 (1998); *Stone & Webster Engineering Corp.*, 115 F.3d at 1574; *Yule v. Burns International Security Service*, Case No. 93-ERA-12, Sec. Dec., May 24, 1995, slip op. at 7-8.

Protected activities

To determine whether Jarvis has shown by a preponderance of the evidence that his protected activity played a role in the suspension decision, we must begin by determining which of Jarvis' activities qualify for protection under the environmental acts and/or the ERA. We concur with the ALJ's finding that the auditing work that Jarvis performed between April 1991 and May 1992 and Jarvis' raising of compliance and retaliation concerns directly to Wiley over the period of April - October 1992 clearly qualify for protection under the environmental acts and the ERA. *See R. D. and O.* at 3; *MacLeod v. Los Alamos National Laboratory*, ARB No. 96-044, ALJ Case No. 94-CAA-00018, Apr. 23, 1997, slip op. at 6-7; *Minard v. Nerco Delmar Co.*, Case No. 92-SWD-1, Sec. Dec., Jan. 25, 1994, slip op. at 4-16; *Crosby v. Hughes Aircraft Co.*, Case No. 85-TSC-2, Sec. Dec., Aug. 17, 1993, slip op. at 23-32; *Conaway v. Valvoline Instant Oil Change, Inc.*, Case No. 91-SWD-4, Sec. Dec., Jan. 5, 1993, slip op. at 3-4 and cases cited therein.

In addition, there is the question whether Jarvis' 1995 work on the development of the RAC for the Tank Waste Remediation System was protected activity. The ALJ found that ERA protection of the RAC work is contingent on proof that Jarvis reasonably believed that the risk assessment methodology then in use by DOE was in violation of the ERA. *R. D. and O.* at 4. We disagree. The protection afforded whistleblowers by the ERA extends to employees who, in the course of their work, must make recommendations regarding how best to serve the interest of nuclear safety, even when they do not allege that the *status quo* is in violation of any specific statutory or regulatory standard. *See, e.g., Diaz-Robainas v. Florida Power & Light Co.*, Case No. 92-ERA-10, Sec. Dec., Jan. 19, 1996, slip op. at 3-4, 10-14; *Collins v. Florida Power Corp.*, Case Nos. 91-ERA-47/49, Sec. Dec., May 15, 1995, slip op. at 2, 5-6. Under this standard, Jarvis' development of a

methodology to be used to assess the risks posed by radioactive waste deposited in a tank waste remediation system and to determine the safeguards warranted by the system thus qualifies for protection under Section 211 of the ERA.⁷

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Retaliatory intent analysis

We next consider whether the evidence links these protected activities to the decision to impose the one-week suspension on Jarvis. The Personnel Action Review Committee (PARC) that made the decision was composed of nine members of Battelle management. HT at 155- 60 (Merryman). Specifically, the PARC was comprised of the three levels of management above Jarvis (Gajewski, Heaberlin, and Shipp), along with four members of the Battelle human resources staff (Marilyn Merryman, Rich Adams, April King, and Pat Lamberson); Battelle legal counsel, Steve Porter; and Ron Walters, a manager from another Battelle division. CX 16; HT at 145, 160- 61, 170, 185 (Merryman), 295 (Gajewski). The PARC was convened on April 23, 1996, to determine what discipline was warranted by Jarvis' telephone conversation with Peschong on Sunday, April 21, and Jarvis' presence in his wife's office on Monday, April 22. CX 16; HT at 159, 183.⁸ Battelle urges that its decision was based on concerns regarding the disruptive effect that Jarvis' actions had on Battelle staff and on DOE staff at the Richland facility, and the potentially damaging effect that it could have on DOE's use of Battelle to perform work in the future. Resp. Br. at 26; *see* HT at 19-20 (Battelle counsel).

The evidence indicating that the PARC discussed Jarvis' "communications style" in its deliberations is uncontradicted.⁹ HT at 181-82, 186-87 (Merryman), 217-18, 233-34, 239 (Heaberlin), 295-96, 299-300, 349, 351-53 (Gajewski), 397-400 (Shipp). In addition, the April 26, 1996 letter from Gajewski advising Jarvis of his suspension refers to the "consistent message" in Jarvis' Staff Development Reviews regarding the need for Jarvis to improve his communications style. CX 5; *see* CX 2, 3, 4. Gajewski's reference to Jarvis' SDRs and the testimony of Gajewski, Heaberlin, and Shipp suggest that the PARC's decision was based in part on a reputation that had developed as a result of Jarvis' protected activities. HT at 102- 03 (Jarvis), 205-08, 212-15, 243-44, 249-50 (Heaberlin), 261-69, 270-72, 276-77, 280-87, 294-95, 298-99 (Gajewski), 359-62 (Shipp); CX 2, 3, 4, 7, 9, 10, 11, 12, 13, 14, 15.

We find, however, that the following evidence establishes that the sole reason for the PARC's decision to suspend Jarvis for one week was Jarvis' inappropriate intervention in a DOE personnel matter involving his wife, and not his protected activities. Although both Heaberlin and Gajewski testified that they had not found Jarvis to be intimidating or abrasive, Gajewski provided examples of incidents unrelated to Jarvis' protected activities that apparently had contributed to the widespread perception among Battelle staff that Jarvis was intimidating and abrasive. HT at 287-94, 343-49 (Gajewski); *see* HT at 217-18, 239 (Heaberlin). Gajewski's testimony clearly distinguishes his concerns about Jarvis' communications style from the substance of Jarvis' protected activities and is

corroborated by the January 15, 1996 SDR in which Gajewski evaluated Jarvis' 1995 work on the RAC. In that SDR, Gajewski encouraged Jarvis' conscientious,

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aggressive efforts to develop an approach to risk assessment that was markedly different from that which was then in use by DOE. CX 2; *see* HT at 85-87 (Jarvis), 200-09, 212-16, 220-22 (Heaberlin), 260-70 (Gajewski). More specifically, Gajewski praised Jarvis' technical work on the content of the Criteria -- "serious iconoclasm" and "aggressive movement" toward a radically different method for DOE risk assessment -- while expressing his concerns about the problems that arose because additional preliminary discussions were needed to facilitate DOE's receptivity to this methodology. CX 2; *see* HT at 260-70 (Gajewski).

The value of Gajewski's testimony in understanding the suspension decision is further enhanced by evidence indicating a lack of retaliatory animus on Gajewski's part. First, it is significant that Gajewski had been Jarvis' immediate supervisor only since January 1994, and thus was not one of the supervisors about whom Jarvis had complained to Battelle Director Wiley in 1992. HT at 260 (Gajewski). In addition, Gajewski testified that he was familiar with Jarvis' 1992 involvement with Wiley only because Jarvis had shared that information with Gajewski soon after he became Jarvis' supervisor. HT at 281-86. Moreover, Gajewski viewed Jarvis' 1992 whistleblower actions in a favorable light. HT at 282-86, 340. Gajewski specifically testified that he understood that Jarvis had "gone to great lengths to resolve a legitimate concern" in 1992 and that Jarvis' complaints to Wiley had "turned out for the good" of the laboratory. HT at 282, 340.

The evidence also demonstrates that the PARC considered other factors under the general category of "communications style" that are clearly not related to Jarvis' 1991-92 or 1995 protected activities. *See* HT at 396 (Shipp). As indicated in the factual summary above, O'Dell had objected to Mary Jarvis' participation in the teleconference call regarding the RAC and had stated that he was going to request a formal DOE investigation into the issue whether a conflict of interest was involved. HT at 359-62 (Shipp); *see* HT at 248-49 (Heaberlin). That conflict of interest issue was apparently resolved by DOE, and the minutes of the PARC meeting indicate agreement among the committee members that a conflict of interest issue was not relevant to the subject before the committee. CX 16; HT at 163-64 (Merryman), 215-16 (Heaberlin), 396-97, 401-02 (Shipp); *but see* HT at 231-33, 239-40 (Heaberlin, testifying that he viewed the Jarvisses' active support for each other's positions on scientific issues to be inappropriate).

Another factor that the PARC considered under the general category of "communication style" was the overlap between the careers of Jarvis and his wife. The PARC meeting minutes indicate there was discussion of Jarvis' "history of inappropriate intervention." CX 16. PARC participants' testimony indicates that this reference concerned a report by Ron Walters that Jarvis had intervened -- sometime in 1994 -- in a personnel matter involving his wife while she was still employed by Battelle in Walters'

chain of command. HT at 164 (Merryman), 374-76, 395-96 (Shipp); *see* HT at 405-11 (Jarvis), 413-26 (Mahaffey), 427-31 (Kennedy).¹⁰ The

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"intervention" point raised by Walters was a particularly relevant, legitimate factor for consideration by the PARC in addressing the Peschong incident. It is also significant that the SDR signed by Gajewski in April 1995 counseled Jarvis to "[t]hink carefully about when, where and how to raise concerns about org[a]nizational and personnel issues." CX 4 at 3.

For these reasons we conclude that Jarvis failed to prove that his protected activity played any part in Battelle's decision to suspend him. Even if we were to hold that Battelle management's feelings about Jarvis' protected activities played some part in the PARC's deliberations, however, we would conclude that Battelle established by clear and convincing evidence that it would have taken adverse action in the absence of Jarvis' protected activity. The testimony of Merryman, Heaberlin, Gajewski, and Shipp indicates that they would have supported imposition of the one-week suspension even if the history of criticisms of Jarvis' communications style had not been considered, and that they believed the PARC as a whole would have reached the same result. HT at 171-72, 187 (Merryman), 241-42 (Heaberlin), 272, 299, 349 (Gajewski), 400 (Shipp). The PARC members elaborated on their concerns about both the immediate and long-term damage to the business relationship between Battelle staff and the DOE staff at the Richland facility.

The immediate effect of the Peschong incident was the disruption of the routine duties of various managers at Battelle and at the DOE Richland facility. Specifically, DOE managers Peschong, McClusky, and representatives from the human resources and security offices at the Richland facility were occupied by the need to address the situation on Monday, April 22, 1996. HT at 223-25 (Heaberlin), 372 (Shipp); CX 6, 20, 21 (McClusky dep.) at 16-21; RX 4, 5, 13. At the Battelle laboratory, Shipp, Heaberlin, Gajewski, and human resources specialists were involved for the majority of the day on April 22 in responding to DOE's request that Jarvis be called back to his office and away from the Richland site, and in determining what further action was warranted. HT at 148-55 (Merryman), 222-25 (Heaberlin), 273 (Gajewski), 371-73 (Shipp); CX 6, 20; RX 4, 5.

Merryman, Shipp, and Gajewski also were concerned about the potential long-term effect on Battelle's client relationship with DOE. The Battelle managers explained that DOE is continuously making project assignments to Battelle and other research organizations; if DOE is uncomfortable with the working relationship with Battelle staff, such DOE assignments and the corresponding funding may be lost. HT at 192-94 (Merryman), 274-76 (Gajewski), 358-59, 376-78 (Shipp). Their testimony is corroborated by Gajewski's letter informing Jarvis of the suspension decision, in which Gajewski expresses concern that the Peschong incident may have "long-term impacts on Battelle - DOE relationships" and counsels Jarvis to be mindful that "personal relationships should

not impair or degrade the professional relationships necessary to carry out our mission." CX 5.

CONCLUSION

Jarvis engaged in protected activities in his 1991-92 auditing work, raising various concerns to Wiley, and in his 1995 work developing the Risk Acceptance Criteria. However,

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we conclude that these protected activities were not the cause of his one-week suspension in April, 1996, but that Jarvis was suspended because of abrasive comments he made to a DOE supervisor in connection with a personnel matter involving Jarvis' wife, Mary Jarvis. Although the individuals who made the decision to suspend may have been aware of prior criticism of Jarvis in connection with his confrontational manner, some instances of which may have been manifested in connection with his earlier protected activity, we find that the concerns of the committee members who suspended Jarvis were unconnected with the substance of any environmental issues that Jarvis may have raised. The inter-personal frictions evidenced in these earlier incidents merely provided context to events leading to the April, 1996, suspension. Consequently, Jarvis has not established by a preponderance of the evidence that his suspension was based, even in part, on his protected activities. *See Dysert*, 105 F.3d at 610.

We further conclude that even if we were to find that Jarvis' earlier protected activity played some part in Battelle's decision to suspend him, Battelle has presented clear and convincing evidence that it would have suspended Jarvis even in the absence of such protected activity. Therefore, we would deny Jarvis' complaint even under a dual motive analysis. *See Odom*, slip op. at 3, 13; *Yule*, slip op. at 7-8 and cases cited therein.

ORDER

Accordingly, the complaint **IS DISMISSED**.

SO ORDERED.

PAUL GREENBERG

Member

CYNTHIA L. ATTWOOD

Acting Member

[ENDNOTES]

¹ The following abbreviations are used in this decision to refer to the evidence of record: hearing transcript, HT; complainant's exhibit, CX; respondent's exhibit, RX.

² In March 1992, Billy Shipp, Battelle's Associate Laboratory Director for Environmental Technologies and a participant in the decision to suspend Jarvis in April 1996, was among the various managers from Battelle and Westinghouse Hanford who were responsible for safety at the 324 Building. RX 15. Although Shipp participated in a March 10, 1992 pre-inspection meeting with Jarvis concerning the lithium storage issue, he testified at hearing that he did not recall interacting with Jarvis on that occasion. RX 15; HT at 33-37, 70, 120-24 (Jarvis), 362-68, 386-91 (Shipp).

³ Wiley, Chikalla, and Hirsch left their respective positions at Battelle in 1995 and early April 1996. HT at 142-43 (Jarvis).

⁴ The RAC developed by Jarvis provides a comprehensive methodology for determining the safeguards warranted by a postulated event, which could be either a potential accident or a normal operating activity. Jarvis' RAC was designed to be utilized with risk assessment tools already in use, such as safety analysis reports and environmental impact statements, to determine the levels of risk that are acceptable for various aspects of DOE's operation of its Tank Waste Remediation System and to supersede existing operational guidelines. CX 1 at 1, 2, 16.

⁵ Battelle has a written policy requiring most suspensions of staff in positions such as Jarvis' to be imposed in one-week increments. HT at 178-79.

⁶ The employee protection provision of the ERA was amended by Section 2902(b) of the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, effective October 24, 1992.

⁷ We emphasize that the record does not suggest that Jarvis engaged in conduct in the course of his protected activities that would remove those activities from protection. *See generally Martin v. Dep't of the Army*, Case No. 93-SDW- 1, Sec. Dec., July 13, 1995, slip op. at 5 and cases cited therein (engaging in conduct that is "indefensible under the circumstances" will remove otherwise protected activities from protection). The criticisms of Jarvis' communications style that arose from his auditing work and the teleconference regarding the RAC are not indicative of behavior that would negate the protection provided under the ERA and the environmental acts. *Cf. Hadley v. Quality Equipment Co.*, Case No. 91-TSC-5, Sec. Dec., Oct. 6, 1992, slip op. at 14-16 (activity lost its protected status when complainant used obscene and abusive language).

⁸ The PARC apparently was not concerned about Jarvis' telephone conversation with McClusky, another of Mary Jarvis' supervisors. McClusky testified that Jarvis was "very amiable, very cordial" in his telephone conversation with McClusky on the night of Friday, April 19, 1996, and McClusky was emphatic in stating that he did not view Jarvis' call to him as inappropriate. CX 21 (McClusky dep.) at 15. McClusky stated that he was

anxious to help resolve the disagreement between Peschong and Mary Jarvis if he could do so. *Id.* at 18.

⁹ Gajewski and Heaberlin testified that the issue of Jarvis' communications style was considered by the PARC for the purpose of determining the reasonableness of Peschong's reaction to Jarvis' telephone exchange with him on Sunday, April 21. HT at 231, 238-39 (Heaberlin), 296, 299-301, 349, 351-53 (Gajewski). Not surprisingly, Jarvis' perception of the exchange differed significantly from that of Peschong. *Compare* CX 18 *and* HT at 97-98, 111-16 *with* RX 13 *and* HT at 310-14, 323-24. It was thus logical for the PARC to consider Jarvis' "communications style" in determining whether Jarvis' statements to Peschong should have engendered the level of concern demonstrated by Peschong.

¹⁰ At hearing, Battelle presented the testimony of Judy Mahaffey, the Battelle supervisor who had been Mary Jarvis' second level supervisor and who was the source of Walters' information. HT at 413-26. In rebuttal, Jarvis presented his own testimony and that of William Kennedy, who had been Mary Jarvis' immediate supervisor at the pertinent time. HT at 405-11 (Jarvis), 427-31 (Kennedy). Although the testimony of Jarvis and Kennedy contradicts some aspects of the account provided by Mahaffey, it is clear that Mahaffey had advised Walters that she believed that Jarvis had intervened inappropriately in a personnel matter concerning Mary Jarvis. HT at 424. In determining whether an employer's explanation is worthy of credence, we must determine whether the employer actually believed and relied on the reasons cited, not whether such bases are factually sound. *See Monteer v. Casey's General Stores, Inc.*, Case No. 88-SWD-1, Sec. Dec., Feb. 27, 1991, slip op. at 7-8 and cases cited therein. In this case, the record does not suggest that Walters' statements to the PARC were made other than in good faith.